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IN THE

Supreme Court of the United States

October Term, 1979

STATE OF MONTANA, et al.,
Petitioners,
v.
UNITED STATES OF AMERICA and
CROW TRIBE OF INDIANS, MONTANA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE

Confederated Tribes of the Colville Indian Reservation, Quinault Indian Nation, Assiniboine and Sioux Tribes of the Fort Peck Reservation, Montana, Shoshone Tribe of the Wind River Reservation, Wyoming, Nez Perce Tribe of Idaho, and The Association On American Indian Affairs, Inc.

IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

Interest of Amicus Curiae 1

Summary of Argument 2

Argument 4

I. The Crow Tribe Has Authority to Prohibit Non-Resident Non-Members from Hunting and Fishing on the Crow Reservation 4

A. The Indian Treaty-Secured Hunting and Fishing Right Cannot Be Subordinated To or Diminished By the State's Licensing of Its Citizens to Hunt and Fish On the Reservation 6

B. The Tribe Has Governmental Authority to Prohibit Non-Member Hunting and Fishing Which Infringes Upon the Hunting and Fishing Resource Reserved By the Treaty for Tribal Members 9

C. This Court Should Not Endorse the Ninth Circuit's Dictum That It Would Be An Impermissible Criminal Sanction for a Tribe to Enforce Its Hunting and Fishing Regulation by Forfeiting the Arms or Other Property of a Non-Indian 14

II. The Crow Tribe Beneficially Owns the Bed and Banks of the Bighorn River 17

Conclusion 23

TABLE OF AUTHORITIES

Table of Cases

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) ..... 3, 6, 7, 8, 17, *et seq.*

Antoine v. Washington, 420 U.S. 194 (1974) 2, 7

Boyd v. United States, 116 U.S. 616 (1886) 15, 16

Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906) 11, 12

Page

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, *rehearing denied*, 417 U.S. 977 (1974) 16

Choctaw Nation v. Oklahoma, 397 U.S. 620, *reh. den.*, 398 U.S. 945 (1970) ..... 3, 4, 17, 18, 19, *et seq.*

DeCoteau v. District Court, 420 U.S. 425 (1975) 2

Department of Game of Washington v. Puyallup Tribe, 414 U.S. 44 (1973) *(Puyallup II)* 7, 8

Dobbins Distillery v. United States, 96 U.S. 395 (1877) 16

Donnelly v. United States, 228 U.S. 243 (1913) 3, 19

Goldsmith-Grant Co. v. United States, 254 U.S. 505 (1921) 16

Helvering v. Mitchell, 303 U.S. 391 (1938) 16

Mattz v. Arnett, 412 U.S. 481 (1973) 6, 7

McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973) 12

Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) 6, 7

Mescalero Apache Tribe v. Jones, 411 U.S. 128 (1972) 2

Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962) 7

Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1976) 13

Montana Power Co. v. Rochester, 127 F.2d 189 (9th Cir. 1942) 3, 21

Moore v. United States, 157 F.2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947) 3, 21

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1979) 2, 10, 14, 17

Omaha Tribe v. Village of Walthill, 334 F.Supp. 823, *aff'd*, 460 F.2d 1327 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973) 20

One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) 16

Powers of Indian Tribes, 55 ID 14 (1934) 12

Page

Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) *(Puyallup I)* 2, 7, 21

Puyallup Tribe, Inc. v. Washington State Game Department, 433 U.S. 165 (1977 *(Puyallup III)* 7, 20, 21

Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976) 14, 15

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 2

Seufert Bros. Co. v. United States, 249 U.S. 194 (1919) 7

Seymour v. Superintendent, 368 U.S. 351 (1962) 13

Shively v. Bowlby, 152 U.S. 1 (1894) 17

State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) 22

Tulee v. Washington, 315 U.S. 681 (1942) 7

United States v. Alaska, 423 F.2d 764 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970) 3, 22

United States v. Boynton, 53 F.2d 297 (9th Cir. 1931) 21

United States v. City of Anchorage, 437 F.2d 1081 (9th Cir. 1971) 22

United States v. Finch, 548 F.2d 822 (9th Cir. 1976), *rev'd on other grounds*, 433 U.S. 676 (1977) 5, 18

United States v. Holt State Bank, 270 U.S. 49 (1926) 19

United States v. Mazurie, 419 U.S. 544 (1975) 11, 12, 14

United States v. Montana, 604 F.2d 1162 (9th Cir. 1979) 4

United States v. Pollman, 364 F. Supp. 995 (D. Mont. 1973) 21-22

United States v. Romane, 255 F. 253 (9th Cir. 1919) 21

United States v. Stotts, 49 F.2d 619 (9th Cir. 1930) 21

United States v. Ward, ... U.S. ...., 65 L. Ed. 2d 742 (June 27, 1980) 15, 16

United States v. Winans, 198 U.S. 371 (1905) 2, 7, 19

Various Items of Personal Property v. United States, 282 U.S. 577 (1931) 16

Page

Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965) 2-3

Washington v. Confederated Tribes of the Colville Indian Reservation, ... U.S. ...., 65 L. Ed. 2d 10 (June 10, 1980) ..... 3, 5, 10, 11, 12, *et seq.*

Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1970) 2, 7, 8, 19, 20

White Mountain Apache Tribe v. Bracker, 48 U.S.L.W. 4897 (June 27, 1980) 3, 10, 11, 12

Williams v. Lee, 358 U.S. 217 (1959) 11, 12

Statutes

Act of April 11, 1882, 22 Stat. 42 9

Act of June 4, 1920, 41 Stat. 751 9

General Allotment Act of February 8, 1887, 24 Stat. 338 (codified as 25 U.S.C. § 331 *et seq.* 9

Treaty of 1868, 15 Stat. 649, 2 Kapp. 108 (Article 2) 6

18 U.S.C. § 1154 14

18 U.S.C. § 1165 ..... 5, 13, 14

Textbooks

60 Minn. L. Rev. 379 (1976) 16

Other Authority

S. Rep. No. 1686, 86th Cong., 2d Sess. (1960) 14

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IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

This brief is submitted with the written consent of all parties to the case, lodged with the Clerk. *Amici*, six federally recognized Indian Tribes, enjoy various hunting and fishing rights within their reservations which may be affected by the outcome of this case. In addition, each of the tribes has navigable bodies of water within or forming the boundary of their reservations, and claims ownership of the submerged lands.

The Association on American Indian Affairs, Inc., is a non-profit membership corporation organized under the

laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States and is nation-wide in scope, with a membership of 50,000 that consists of both Indians and non-Indians.

The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau v. District Court*, 420 U.S. 425 (1975) and the filing of *amicus curiae* briefs in *Washington v. Washington State Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979);*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Mescalero Apache Tribe v. Jones*, 411 U.S. 128 (1972); *Puyallup Tribe v. Dept. of Game*, 391 U.S. 392 (1968) and *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965).

SUMMARY OF ARGUMENT

1. It is undisputed that the Crow Tribe has treaty fishing and hunting rights on its reservation. The State of Montana, despite a tribal prohibition of non-member hunting and fishing on the reservation, continues to authorize non-Indian sport hunting and fishing on reservation fee lands. This Court has at least a dozen times this century acted to protect tribal fishing and hunting rights against incursions by states and private persons. Not only have direct interferences by states against Indians themselves been prohibited, *see e.g., Antoine v. Washington*, 420 U.S. 194 (1974); *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968), but the states have also been prohibited from authorizing *non-Indians* to take action inconsistent with those rights. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1970). *See also United States v. Winans*, 198 U.S. 371

(1905); *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918). These holdings control here; unless the tribal prohibition remains effective, the state will continue to permit non-Indians to hunt and fish which will tend materially to reduce the natural supply of fish and game available to the Indians.

In addition, this Court has repeatedly recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians in which the tribes have a significant interest on reservation lands. *Washington v. Confederated Tribes of the Colville Indian Reservation,* .... U.S. ...., 65 L. Ed. 2d 10 (June 10, 1980). This tribal sovereignty retains a significant geographical component and extends to the reservation boundary. *White Mountain Apache Tribe v. Bracker,* 48 U.S.L.W. 4897, 4901 (June 27, 1980). The Crow Tribe has clearly demonstrated a significant interest in the hunting and fishing activities of non-Indians on the reservation sufficient to justify this exercise of tribal civil jurisdiction.

2. The Crow Indian Tribe retains beneficial ownership of the bed and banks of the Bighorn River. Based on a series of this Court's decisions including *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918); *Donnelly v. United States,* 228 U.S. 243 (1913); and *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970), as well as a host of lower court decisions, *e.g., Moore v. United States,* 157 F.2d 760 (9th Cir. 1946); *Montana Power Co. v. Rochester,* 127 F.2d 189 (9th Cir. 1942); *United States v. Alaska,* 423 F.2d 764 (9th Cir.) *cert. denied* 400 U.S. 967 (1970), the Crow Tribe has settled expectations that it retains beneficial ownership of the bed and banks of the Bighorn River. This is so not only because of the utility of the bed and waters of the river in satisfying the purpose of the reservation, to establish a self-sustaining homeland for the Indians, *see Alaska Pacific Fisheries, supra,* but also because of the "natural inference" of ownership which

arises because the disputed riverbed lies entirely within the exterior boundaries of the Reservation. *See Choctaw Nation v. Oklahoma, supra.* These legitimate expectations should not be frustrated.

ARGUMENT

I. The Crow Tribe Has Authority to Prohibit Non-Resident Non-Members from Hunting and Fishing on the Crow Reservation.

The primary issue presented in this appeal is whether a tribe, in order to protect the treaty hunting and fishing rights of its members on the reservation, may prohibit non-members from hunting and fishing on reservation fee lands upon which they do not reside. *Amici* suggest that the issue can be resolved by reference to this Court's prior decisions protecting Indian treaty hunting and fishing against incursions by states and by private parties. Alternatively, the tribal prohibition is sustained by this Court's decisions protecting tribal governmental power over subject matters substantially affecting tribal interests on reservations.

The Crow Reservation is a substantial Indian Reservation in Montana with several thousand Indian residents. Indians are a majority of the population on the Reservation, and over two-thirds of the land is owned by the United States in trust for Indians.[1] The Tribe's 1973 Resolution closing the Reservation to hunting and fishing by non-members was enacted because the Tribe determined that there was an on-reservation shortage of the fish and game upon which members depended for subsistence. See Petition App. 119; Crow Tribe Brief on Petition at 2-3. This case was brought to sustain the validity of the

1. The court below found that the Reservation contains 2,282,764 acres. The court found that there are almost 1,200,000 acres of trust allotments (52.02 percent of the Reservation) and over 390,000 acres of tribal trust lands (17.33 percent of the Reservation). Privately owned fee lands are 28.33 percent of the Reservation's acreage. *United States v. Montana,* 604 F.2d 1162, 1164, n.3, (9th Cir. 1979).

prohibition against the claim by the State of Montana of continuing power to license non-Indians to hunt and fish for sport on the Reservation.

The court of appeals sustained the tribal prohibition as applied to non-residents of the Reservation, and as applied to residents "except . . . hunting and fishing . . . on fee patent lands on which such non-members reside." 604 F.2d at 1165. The State appeals both this portion of the decision and the court of appeals' holding that the bed of the Big Horn River, which flows through the Reservation, is held by the United States in trust for the Tribe and not owned by the State.[2]

The Tribe and the United States have not petitioned for review of the lower court's preclusion of tribal prohibition of hunting and fishing by residents on their own lands, so that issue is not before the Court. The State and its supporting parties now concede tribal authority to prohibit all non-Indian hunting and fishing *on trust lands*[3]—over two-thirds of the Reservation. *See State of Washington v. Confederated Tribes of the Colville Reservation,* .... U.S. ...., 65 L.Ed. 2d 10 (1980). The present dispute, therefore, focuses on whether the State can authorize non-members to hunt and fish on Reservation fee lands upon which they do not reside in the face of a tribal prohibition.[4]

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2. The controversy over ownership of the riverbed is a part of the larger dispute concerning non-Indian hunting and fishing on the Reservation. *United States v. Finch,* 548 F.2d 822 (9th Cir. 1976), *rev'd on other grounds,* 433 U.S. 676 (1977) was a prosecution of a non-Indian fishing in the River as permitted by the State but contrary to the tribal prohibition. The Court held that the bed of the River constituted tribal trust lands, and that the defendant, Finch, could thus be convicted for violating 18 U.S.C. § 1165, a statute prohibiting fishing on such lands without tribal permission. *See* 13, *infra.* This Court reversed on grounds not related to this determination. Meanwhile, the United States and the Crow Tribe had commenced this action for a judgment declaring the validity of the tribal prohibition with respect to all lands within the Reservation, and to adjudicate ownership of the riverbed.

3. State Brief at 30.

4. The court below also determined that the Tribe could regulate hunting and fishing by non-member residents on their own lands in a

A. *The Indian Treaty-Secured Hunting and Fishing Right Cannot Be Subordinated To or Diminished By the State's Licensing of Its Citizens to Hunt and Fish On the Reservation.*

First, it is undisputed and indisputable that the treaties with the Crows reserved to them rights to hunt and fish on the Reservation, and that the Tribe holds these rights today.[5] Article 2 of the Treaty of 1868, 15 Stat. 649, 2 Kapp. 1008, provides in part that the Reservation would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named . . ." Even in the absence of "exclusive use" guarantees, this Court has recognized that the setting aside of a reservation, in itself, guarantees to the tribes the right to hunt and fish. In *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 405-406 (1968), construing a treaty where "nothing was said . . . about hunting and fishing and fishing rights," the Court held that these rights were so central to the Indian way of life that they were necessarily included within a treaty provision setting aside a reservation "for a home, to be held as Indian lands are held." *See also Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918).[6]

During this century the Court has at least a dozen times in different contexts acted to protect tribal fishing and hunting rights (ranging geographically from Wisconsin to Alaska) against incursions by states and private persons.

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reasonable, non-discriminatory fashion consistent with sound principles of conservation. 604 F.2d at 1162, 1172. But no actual tribal regulation of non-members on these lands, as distinct from an outright prohibition, is presented by the facts of this case, and any controversy in this respect is abstract and in *Amici's* view not appropriate for review by this Court.

5. The State so concedes. State Brief at 20.

6. As the Court made clear in *Menominee,* these on-reservation fishing rights survive even termination; it necessarily follows that on a Reservation such as Crow where no termination has occurred, these rights continue. The lesser step, the opening up of parts of the Reservation to non-Indian settlement pursuant to the Allotment Act, has had no effect on these rights. *See e.g., Mattz v. Arnett,* 412 U.S. 481 (1973); p. 7, *infra.*

Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979); *Puyallup Tribe v. Department of Game of Washington*, 433 U.S. 165 (1977); *Antoine v. Washington*, 420 U.S. 194 (1975); *Department of Game of Washington v. Puyallup Tribe*, 414 U.S. 44 (1973); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Menominee Tribe v. Department of Game, supra; Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968); *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962); *Tulee v. Washington*, 315 U.S. 681 (1942); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); *United States v. Winans*, 198 U.S. 371 (1905). In *United States v. Winans, supra*, the Court described off-reservation treaty fishing rights as "not much less necessary for the existence of the Indians than the atmosphere they breathed", (198 U.S. at 381), and limited the taking of fish by a private person downstream from the Indians. In *Alaska Pacific Fisheries*, the Court affirmed a lower court injunction against a private company's erection of a fish trap in waters on a reservation which "will tend materially to reduce the natural supply of fish accessible to the Indians." 248 U.S. at 87.

In *Menominee*, the Court held that a state could not diminish Indian hunting and fishing rights protected by treaty on a reservation by direct regulation of that right, even where federal trust status of all lands on the reservation had been terminated. The majority of later cases, like *Menominee*, impose limitations on *state action* which directly or indirectly infringes upon the exercise of treaty protected hunting and fishing rights. The most recent decision of this Court, *Fishing Vessel Association*, required the State to limit the non-Indian take of fish outside reservations so that treaty-protected Indian fishing rights would not be infringed.

The principles of these cases control here. This dispute arose because of private activity, authorized by the State, which, unless controlled, will as in *Alaska Pacific Fisheries*

"tend materially to reduce the natural supply of [fish and game] accessible to the Indians" on an Indian reservation.

Even outside a reservation where the state authority is ordinarily undiminished, *Fishing Vessel Association* and other cases teach that states may not authorize non-Indians to infringe on treaty rights to take fish and game. States are prohibited therefore not merely from interfering directly with the exercise of Indian treaty rights by the Indians themselves, but also from authorizing non-Indians to take action which will interfere with those rights.

In the instant case, where the issues arise inside the reservation, the arguments in favor of protecting the tribal rights are even stronger. In fact, in *Fishing Vessel Association,* the Court confirmed that a tribe has power to make its on reservation fishery exclusive. The Court observed:

> *Puyallup III* also made it clear that the Indians could not rely on their treaty right to exclude others from access to certain fishing sites to deprive other citizens of the state of a fair apportionment of the runs. For although *it is clear that the Tribe may exclude non-Indians from access to fishing within the reservation,* we unequivocally rejected the Tribe's claim to an untrammelled right to take as many of the steelhead running through its reservation as they chose.

443 U.S. at 683-84. (emphasis added) Thus, although the tribe may not be authorized to "pursue the last living steelhead," *see Puyallup II, supra,* the Court clearly confirmed its power to make the treaty fishing right on the reservation exclusive of non-Indians.

Moreover, the Court confirmed this tribal power in spite of the fact that the Stevens Treaties construed in *Fishing Vessel Association* provided an equal opportunity to take fish to "citizens of the Territory." There is no such co-equal right involved here. The Indian treaty right is prior and paramount and any privilege allowed non-members to hunt or fish on the reservation is subject to the overriding right of the Tribe to satisfy its treaty rights, even reserving the

fish and game exclusively for its members if it chooses. Simply put, the State here cannot affirmatively permit non-members to hunt and fish when the consequence of that action will be to diminish the fish and game resource necessary to satisfy the treaty hunting and fishing rights of tribal members.

The only souces of authority for non-Indian hunting and fishing upon which the State and its supporting *amici* rely are statutes opening certain unallotted lands on the Reservation to settlement and purchase by non-members. State Br. at 31-32, Act of April 11, 1882, 22 Stat. 42; General Allotment Act of February 8, 1887, 24 Stat. 338 now codified as 25 U.S.C. § 331 *et seq.*; Act of June 4, 1920, 41 Stat. 751. But these acts—at most[7] permit *purchasers of those lands* the privilege to hunt and fish if allowed by state law on their own lands. They surely do not authorize affirmative state action permitting *non-residents* to enter the Reservation to fish and hunt particularly in conditions of scarcity. Nor do these statutes authorize residents to hunt or fish indiscriminately throughout the continuing Reservation on lands they do not own in a manner destructive of tribal rights.[8]

B. *The Tribe Has Governmental Authority to Prohibit Non-Member Hunting and Fishing Which Infringes Upon the Hunting and Fishing Resource Reserved by the Treaty for Tribal Members.*

In the previous section, we argued that the Tribe's proprietary hunting and fishing rights are paramount to any state-created privilege, and should in these circumstances be protected against infringement by the State and pri-

7. *Amici* support the argument of the Crow Tribe that it retains exclusive hunting and fishing rights on the Reservation after these statutes, which do not expressly diminish those rights.

8. *Amici* only suggests that in the present circumstances the tribal prohibition to be effective must completely supplant any state authority to allow hunting and fishing by non-members. We believe that the proper

vate persons licensed by it. But, even without reference to Indian hunting and fishing rights, this Court has consistently protected the right of Indian tribes to govern subject matters on their reservations substantially affecting tribal interests where non-members are involved.

Last term, this Court in *Washington v. Confederated Tribes of the Colville Indian Reservation*, ... U.S. ...., 65 L. Ed. 2d 10 (June 10, 1980), (hereinafter "*Colville*") specifically rejected the arguments advanced here by Montana and its supporting *amicus curiae*, including the State of Washington, that *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1979), precluded tribal exercise of civil jurisdiction over non-members. Although the tax issues presented in *Colville* arose on trust land, there is no reason why an exercise of civil jurisdiction over actions by non-residents on fee land that severely impacts Indian use and occupancy of their retained lands would be any more "inconsistent with the overriding interests of the national government" than the exercise of governmental power in *Colville*. As this Court observed:

> The widely held understanding within the Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power. Executive Branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest.

65 L.Ed 2d at 28.

Similarly, in *White Mountain Apache Tribe v. Bracker*, 48 U.S.L.W. 4897, 4899 (June 27, 1980), the Court sug-

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scope and extent of state authority in other situations should be considered in cases precisely presenting that issue and not here. This is clearly not a situation, for example, where the Tribe has not undertaken to regulate on-Reservation activities of non-Indians and the State determines that it must regulate such activities in order to preserve the resource.

gested that tribal civil jurisdiction over non-members was not restricted to trust lands:

> At the same time we have recognized that the Indian Tribes retained attributes of sovereignty over both their members and their territory.

Later in the same opinion, the Court observed:

> The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weight in determining whether state authority has exceeded the permissible limits. 'The cases of this Court have consistently guarded the authority of Indian governments over their reservations.'

Id. at 4901. In support, the Court cited *United States v. Mazurie,* 419 U.S. 544, 557 (1975), and *Williams v. Lee,* 358 U.S. 217, 223 (1959). As the Court took pains to emphasize, it is the reservation boundary, not the fee or trust status of the individual parcel of land, that is significant.

An important early case, cited with approval in *Colville,* 65 L.Ed. 2d at 29, is the court of appeals decision in *Buster v. Wright,* 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906), holding that a tribe by ordinance may lawfully require non-Indians to pay a permit tax, or license fee, as a condition precedent to residing, or doing business, on the reservation. The court stated:

> The authority of the Creek Nation to prescribe the terms upon which non-citizens may transact business within its borders did not have its origins in any Act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty . . . The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by Act of Congress or by the contracts of the Creek Tribe itself.

135 F. at 950.

The Supreme Court dismissed the appeal in *Buster* on the merits, and costs were taxed to the appellants. Significantly for present purposes, the non-Indians required to pay permit taxes and license fees in *Buster* resided on fee lands within the Reservation.[9]

Buster, Mazurie, Colville, Bracker and other prior decisions of this Court teach that Indian tribes may control non-Indian activities on fee lands that substantially impact the tribe or tribal members. To be sure, Indian ownership of trust lands means *ipso facto* that a tribe will likely have a significant interest in non-Indian activities on those lands. But the critical issue in each case is whether the non-Indian activity sought to be regulated significantly impacts the tribe or its members, and not the technical ownership of land alone. *See also McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164, 179 (1973) and *Williams v. Lee,* 358 U.S. 217, 221 (1959), confirming that the tribes have civil jurisdiction over non-members and that state law would be preempted if its application "infringed on the right of reservation Indians to make

9. The Department of the Interior has long administratively interpreted *Buster* as empowering an Indian tribe to regulate non-Indian activities on fee lands within a reservation. In *Powers of Indian Tribes,* 55 ID 14, 50 (1934), the Solicitor of the Interior Department concluded:

> Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty. But over all the lands of the reservation, *whether owned by the tribe, by members thereof, or by outsiders,* the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable Federal laws and does not infringe any vested rights of persons now occupying reservation lands under lawful authority.

(Emphasis supplied) *Id.* at 50. *Amici* do not suggest that a tribe can exclude a non-Indian landowner from his own land on a reservation, for he occupies that land "under lawful authority."

This has continued to be the policy of the Interior Department. In an unpublished opinion dated October 13, 1976, the Solicitor approved an ordinance of the Crow Tribe taxing non-Indian mineral lessees on the Reservation. (A copy of this unpublished opinion is lodged with the Clerk of this Court.) The 1934 Solicitor's opinion was also quoted by the Court in *Colville,* 65 L.Ed. 2d at 28-29.

their own laws and be ruled by them." *Accord, Colville,* 65 L. Ed. 2d at 31.

Non-Indian hunting and fishing on fee lands authorized by the state clearly infringes on both the tribal hunting and fishing right itself and on tribal control of hunting and fishing on the Reservation to protect the interests of its members. The Crow Tribe has a clear and substantial interest in the subject matter, which cannot be protected if tribal jurisdiction is limited to trust lands. Hunting and fishing is vital to the tribal way of life. Fish and game, by their very nature, migrate back and forth inside the reservation and in the face of the State's continued authorization of non-Indian hunting and fishing, tribal subsistence rights can only be protected if the tribal prohibition is effective on fee as well as trust parcels.

This Court's response to the arguments raised by Montana in *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463 (1976), that state jurisdiction turned on the fee or trust status of the land, is particularly apt here. In *Moe,* the Court noted that if Montana's contentions were accepted, "then for *all* jurisdictional purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size." 425 U.S. at 478. The Court observed that it had rejected a similar argument in *Seymour v. Superintendent,* 368 U.S. 351 (1962), and that it was unreasonable to require law enforcement officers operating in the area to search tract books in order to determine whether they had jurisdiction over an activity occurring on a particular parcel of land. Moreover, the Court emphasized in *Moe* that "such an impractical pattern of checkerboard jurisdiction was contrary to the intent embodied in existing federal statutory law," *id.* at 478, which has demonstrated "a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation."[10]

10. Against these considerations, the State's argument that 18 U.S. § 1165, somehow retracts tribal jurisdiction on fee lands is unpersuasive. That statute makes unauthorized hunting and fishing on trust lands a

C. *This Court Should Not Endorse the Ninth Circuit's Dictum That It Would Be An Impermissible Criminal Sanction for a Tribe to Enforce Its Hunting and Fishing Regulation by Forfeiting the Arms or Other Property of a Non-Indian.*

In approving tribal civil regulatory powers over non-Indian hunting and fishing, the court of appeals observed that tribal enforcement, to be consistent with *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), must be accomplished without subjecting non-Indians to the criminal jurisdiction of tribal courts. Although the issue was not presented, the Court also stated:

> Forfeiture of the arms or other property of non-Indians under *Quechan* constitutes an impermissible criminal sanction.

604 F.2d at 1171.

The court of appeals' reference was to *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. 1976) where, in a case arising prior to *Oliphant*, the court of appeals held that the Quechan Tribe had forsworn in its constitu-

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federal crime. The statute does not speak to tribal legislative authority. Enacted in 1960, it was intended as a criminal trespass statute, providing federal criminal prosecution of all non-Indians who trespass on Indian trust lands to hunt or fish. It was entirely reasonable for Congress not to make it a crime to enter reservation fee land where the United States does not hold legal title.

As the Court decided in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 205-206 (1978), Section 1165 was enacted because "non-Indians are not subject to the [criminal] jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges." S. Rep. No. 1686, 86th Cong., 2d Sess. (1960). That a tribe lacks criminal enforcement authority and that Congress has refrained from exercising its power does not entail that tribes have no legislative power to prescribe civil substantive rules. *Compare* 18 U.S.C. § 1154 (*United States v. Mazurie*, 419 U.S. 544 (1975)) providing a specific delegation of legislative authority to tribes to permit liquor sales on reservations, and making violations of *tribal* ordinances a *federal* crime.

A decision by Congress to limit federal criminal enforcement to a subject matter less extensive than the scope of tribal legislative authority does not itself diminish tribal legislative power. Put differently, an act is not made lawful simply because it is not a federal crime. The 1960 statute does not divest tribal legislative bodies of any existing powers.

tion any power to try non-members for violation of tribal law. The Court continued:

> Nor, in view of the foregoing, may the Quechan Tribe cause any non-member who enters the reservation to forfeit his weapons or any other property as a consequence of violating tribal law. '[A]s Mr. Justice Bradley aptly pointed out in *Boyd [Boyd v. United States,* 116 U.S. 616 (1886)], a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law.' *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 700 . . . (1965).

531 F.2d at 411.

The issue whether a forfeiture provision in a tribal hunting and fishing code is "quasi-criminal," is vastly more complicated, we believe, than the Ninth Circuit's discussion would indicate. Recent decisions of this Court demonstrate that the question of whether a particular penalty is civil or criminal turns largely on legislative intent. *United States v. Ward,* .... U.S. ...., 65 L. Ed. 2d 742 (June 27, 1980). It is therefore particularly dangerous to generalize in the absence of a specific legislative enactment. It is not our purpose in this brief to definitively address the issue; we attempt only to demonstrate that it is of sufficient complexity that it should be left to a future case where it is actually presented.

In condemning civil forfeiture provisions as "quasi-criminal," the court of appeals relied on a century-old decision of this Court, *Boyd v. United States,* 116 U.S. 616 (1886). *Boyd,* however, is of questionable validity today. As one commentator notes:

> When Justice Bradley announced in *Boyd* that forfeiture proceedings, "though they may be civil in form, are in their nature criminal," (116 U.S. 616, 633-34) he introduced an unnecessary and dangerous dictum into the law. For the forfeiture involved in *Boyd,* though a penalty for reasons set forth below, definitely was not a criminal penalty . . . The term

> "quasi-criminal," which the Court coined to describe the proceedings, has muddied legal waters ever since.

Clark, *Civil and Criminal Penalties and Forfeitures: A Frame-Work for Constitutional Analysis,* 60 Minn. L. Rev. 379, 414 (1976). Last term, this Court criticized *Boyd* in *United States v. Ward, supra:*

> Read broadly, *Boyd* might control the present case. This Court has declined, however, to give full scope to the reasoning and dicta in *Boyd,* noting on at least one occasion that "Several of *Boyd's* express or implicit declarations have not stood the test of time." *Fisher v. United States,* 425 U.S. 391, 407 (1976).

65 L. Ed. 2d at 752.

Moreover, in a second line of cases, this Court has sustained a series of "civil" penalties and forfeiture provisions on the ground that they were "remedial" rather than "punitive" and hence not subject to the criminal procedure protections in the Constitution. *See, e.g., One Lot Emerald Cut Stones v. United States,* 409 U.S. 232 (1972); *Helvering v. Mitchell,* 303 U.S. 391 (1938).[11]

In *Helvering,* Justice Brandeis observed:

> Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil proceedings . . . In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions.

303 U.S. at 400.

Finally, in *United States v. Ward,* 65 L. Ed. 2d 742 (June 27, 1980), the Court strongly indicated that at least initi-

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11. An additional line of cases has upheld various forfeiture proceedings on the ground that they operate *in rem,* and not against the person. *See e.g., Various Items of Personal Property v. United States,* 282 U.S. 577 (1931); *Goldsmith-Grant Co. v. United States,* 254 U.S. 505 (1921); *Dobbins Distillery v. United States,* 96 U.S. 395 (1877). *See particularly, Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, *rehearing denied,* 417 U.S. 977 (1974).

ally, the proper inquiry in the issue was to determine legislative intent. (Though the Court noted that a sanction might be so punitive in effect as to negate that intention.) The court of appeals' analysis is particularly objectionable in this regard because it had no tribal provision before it.

Finally, we would suggest that the key inquiry, consistent with this Court's opinion in *Oliphant,* is whether an exercise of a civil forfeiture provision would be inconsistent with the tribe's status or inconsistent with the superior interests of the United States. That inquiry should be made with respect to a specific tribal forfeiture provision, not by generalized labels such as the one utilized by the court of appeals. A remedial forfeiture provision could presumably be sustained.

II. The Crow Tribe Beneficially Owns the Bed and Banks of the Bighorn River.

It is well-settled that Congress has power to reserve to Indian tribes title to the beds and banks of navigable rivers. *Choctaw Nation v. Oklahoma,* 397 U.S. 620, *reh. den.* 398 U.S. 945 (1970); *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 87 (1918); *Shively v. Bowlby,* 152 U.S. 1, 47-48 (1894). This Court and the lower courts have consistently rejected attempts to convert the "equal footing" doctrine to a controlling legal principle and confirmed that it is the intention of the parties in setting aside the reservation which controls. Thus, in *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918), this Court rejected the argument that the public navigable waters and submerged lands surrounding the Annette Islands Reserve were held in trust by the United States for a future state, 248 U.S. 79-80, and held that an 1891 statute designating the "body of lands known as the Annette Islands" as an Indian reservation, also reserved to the tribe the "adjacent waters and the submerged lands" between and surrounding the various islands composing the Reserve. 248 U.S. at 87. The Court concluded that these submerged

lands and waters were necessarily included to fulfill the congressional purpose to make the Indians "self-sustaining and advance to the ways of civilized life." 248 U.S. at 89.

More recently, in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), this Court determined that various Oklahoma tribes owned the bed of the Arkansas River where that river is within, or forms a boundary of, their reservation. For present purposes, the most germane part of *Choctaw Nation* concerned the portion of the Arkansas River which lies completely within "one undivided tract of [reservation] land described . . . by exterior metes and bounds." 397 U.S. at 628. The Court concluded that all of the lands within those boundaries, including the river, were clearly encompassed within the grant and found that any contrary argument was strained. The Court emphasized that the "natural inference" from the grants creating the reservation was that all the land within the described metes and bounds was conveyed, including the banks and beds of the rivers.[12] 397 U.S. at 634. Indeed, the Court had

12. The State argues that the Crow in treaty times were more involved in hunting than in fishing and that the 1868 treaty therefore did not reserve the riverbed and its fishery to them. (State Br. at 21) The short answer to this contention is that the cases do not require fish to be "a mainstay of their diet" (*Ibid*) in order to construe a treaty as reserving the riverbed to tribal ownership. The tribes involved in *Choctaw Nation*, for example, were not primarily dependent on fishing when the treaties with them were made, nor were they involved in oil and gas development.

In *United States v. Finch*, 548 F.2d 822, 832 (9th Cir. 1976, the court of appeals, although conceding that the Crows were primarily big game hunters, persuasively rejected the State's argument:

> By establishing a reservation as a "permanent home" for the Crow Indians, . . . the Government manifestly intended to set aside lands which would provide the tribe with the food and natural resources upon which their livelihood depended . . . We find it inconceivable that the United States intended to withhold from the Indians the right to sustain themselves from any source of food which might be available on their reservation. It must have been no mystery to the Government that the Crow Tribe, whose nomadic ways they sought to change, might eventually be forced to derive their existence from a source other than big game, should the large herds of buffalo and elk roaming the plains become extinct by accident of nature or decimation by man.

previously determined that where a Reservation is described as "a tract of country one mile in width on each side of the Klamath River . . . it would be absurd to treat the order as intended to include the uplands to the width of one mile on each side of the river, and at the same time exclude the river." *Donnelly v. United States,* 228 U.S. 243, 259 (1913).

With respect to the Crow Reservation, the circumstances supporting the conclusion that the bed and banks of the Bighorn River are held in trust for the Tribe are particularly compelling. In contrast to the situation before this Court in *United States v. Holt State Bank,* 270 U.S. 49 (1926), the Crow Reservation was established by an 1868 treaty which formally and specifically set aside Crow lands for the "absolute and undisturbed use and occupancy" of the Tribe and its members.[13] Like the rivers considered in *Donnelly* and *Choctaw Nation,* the Bighorn River lies completely encompassed within one undivided tract of land described by metes and bounds. The natural inference that such a fully enclosed riverbed was to be included in the reservation is even stronger than in *Choctaw Nation* because of the fact that these reservation lands were Crow territory when the treaties with the United States were negotiated and ratified. In such circumstances, as this Court made clear in *United States v. Winans,* 198 U.S. 371, 381 (1905), "the treaty was not a grant of rights to the Indians but a grant of rights from them—a reservation of those not granted." *See also, Washington v. Washington State Commercial Fishing Vessels Association,* 443 U.S. 658, 680 (1979). In this case, the issue is not whether the riverbed was *granted to* the tribes, but rather, whether

13. As the Solicitor General explains in his brief for the United States, the Court in *Holt State Bank* emphasized that "[t]here was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters." 270 U.S. at 58. *Holt State Bank* is otherwise distinguishable for reasons set out by the United States in its brief.

the tribes ceded the land to the United States to be held in trust for a future state. It is the *state* therefore which must bear the burden of showing a specific cession.

Moreover, since the Crow Reservation was set aside by treaty, the understanding of the Tribe itself is germane. A treaty between the United States and an Indian tribe is essentially a contract between two sovereign nations, and "it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the [treaty]." *Washington v. Washington Commercial Fishing Vessel Association*, 443 U.S. at 675. Further, as the Court emphasized in *Fishing Vessel Association*, since the United States, in treaty negotiations with Indian tribes, has a responsibility to avoid taking advantage of the other side, the treaty must be construed "in the sense in which [it] would naturally be understood by the Indians." 443 U.S. at 676. Montana can hardly credibly argue that the natural understanding of the Crows was that the treaty, setting aside the described reservation for the "exclusive use" of the Tribe and its members, would have the effect of reserving submerged lands under the Bighorn River for a future state.[14]

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14. Montana argues that the subsequent allotment of lands within the Crow Reservation, portions of which came into the hands of non-Indians in fee status, confirms Montana's ownership of the Bighorn River. But this contention was emphatically rejected by this Court in *Choctaw Nation*. The allotment scheme opening the Oklahoma reservations to settlement at the turn of the century provided "for the final dissolution of the tribes", "the termination of tribal affairs" and "disposition of all [tribal] lands." 397 U.S. at 627. If the Oklahoma Tribes, which were largely dissolved, stripped of governmental powers except for limited purposes, and divested of virtually all tribal lands, nonetheless retain ownership of a riverbed within the reservation, the Crow Tribe must surely retain ownership of the bed of the Bighorn River. *See also Omaha Tribe v. Village of Walthill*, 334 F.Supp. 823, *aff'd*, 460 F.2d 1327 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973).

Puyallup Tribe, Inc. v. Washington State Game Department, 433 U.S. 165 (1977) (Puyallup III), relied upon by the State of Montana, is not inconsistent with this result. Montana attempts to rely on the Court's statement in footnote 12 that a claim by the Puyallup Tribe that it retained trust status title to the bed of the Puyallup River would be "at

Finally, the virtually unvarying application of the above cases by lower courts has been to construe treaties and statutes setting aside reservations embracing or adjacent to navigable bodies of water as reserving to the tribes the submerged lands. For example, in *Montana Power Co. v. Rochester*, 127 F.2d 189, 192 (9th Cir. 1942), the court of appeals held that the 1855 Treaty of Hell's Gate reserved the bed of the Flathead Lake for the Flathead Tribe:

> It is inadmissible to suppose that the United States, having agreed to hold this area in trust for the exclusive use and benefit of the Indian tribes, intended to put the tribes at the mercy of the future state, the policy of which was necessarily unknown at the time of the treaty . . . ; for by adoption of a proprietary policy the state might substantially interfere with, if not foreclose, use of the shore by the Indians in the conduct of their fishing operations.

See also Moore v. United States, 157 F.2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947); *United States v. Romane*, 255 F. 253 (9th Cir. 1919); *United States v. Boynton*, 53 F.2d 297 (9th Cir. 1931); *United States v. Stotts*, 49 F.2d 619 (9th Cir. 1930); *United States v. Pollman*,

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odds with the otherwise uncontradicted findings below." Montana assumes that the finding referred to was the finding that all but 22 acres had been alienated. Petitioner's brief at 26. Montana's reading of the footnote is not persuasive. First, it assumes that the Supreme Court in *Puyallup III* intended to undermine its holding in *Choctaw Nation* that allotment was irrelevant to the ownership of the bed of the river. Second, the Supreme Court specifically identified the finding it refers to—70 Wn.2d at 253, 422 P.2d at 759 (1967) (*Puyallup I*). The Washington Supreme Court there noted:

The trial court also found:

> *All of the lands* within the exterior boundaries of the old Puyallup Indian Reservation were sold, in fee simple absolute, pursuant to an act of Congress . . . with the exception of two small tracts which are presently being utilized as a cemetary for members of the federal organization known at the "Puyallup Tribe." (emphasis added)

We believe it more logical to read note 12 to indicate that the lower court had held that *all* of the lands, including the bed of the river, had been sold. Since the Puyallup Tribe had not appealed, the Court was simply indicating that it was bound by that finding.

364 F. Supp. 995 (D. Mont. 1973); *United States v. Alaska*, 423 F.2d 764 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970); *United States v. City of Anchorage*, 437 F.2d 1081 (9th Cir. 1971).

Each of these cases is, of course, unique. Recognition of the retained trust ownership has been based on the language in the documents setting aside the reservations, the exceptional circumstances creating them, the historical facts, and upon the general principles that Indian reservations were set aside to provide tribes with a self-sustaining homeland by preserving for the tribe basic natural resources. The point we would emphasize is that because of these cases, as well as the Supreme Court cases decided above, the various tribes in this country have settled expectations concerning their rights to the bed and banks of navigable bodies of water within the reservations.[15] This Court should hesitate to upset those expectations. *See State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 382 (1977).

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15. The State's implication (State Br. at 19, 22-23; *also see Amicus Curiae Brief* of the State of Washington at 9-13), that ownership of the riverbed by the Tribe for purposes of exploiting mineral or fishing resources somehow deprives the United States of power to protect navigation and public commerce and permits the Tribe to obstruct use of the river as a public highway was summarily rejected in *Choctaw Nation*, 397 U.S. at 635.

CONCLUSION

Amici respectfully suggest that the decision of the court of appeals below should be affirmed.

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